SUPREME COURT, U.S.
FILED
SEP 13 1999
OFFICE OF THE CLERK

No. 99-____

IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—against—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

WILLIAM M. BROOKS
(*Counsel of Record*)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331

6 pp

QUESTION PRESENTED

Does the involuntary hospitalization of an allegedly mentally ill person by physicians at a private hospital pursuant to the New York Mental Hygiene Law constitute state action that imposes constitutional restraints upon the physicians' actions when the only authority for confining the individual is the State's civil commitment laws?

LIST OF PARTIES

The names of the parties in the proceeding in the court whose judgment is sought to be reviewed are as follows:

Plaintiff-Appellant

Rhoda Okunieff

Defendants-Appellees

R. Rosenberg, M.D.

Anne Skomorossky, M.D.

Lorraine Innes, M.D.

Stan Arcow, M.D.

Elizabeth Mirabello, M.D.

Jane Doe

Columbia Presbyterian Medical Center

Herbert Pardes, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Proceedings Below	3
REASONS FOR GRANTING THE WRIT	5
I. THE OPINION BELOW THREATENS TO DEPRIVE MENTALLY ILL INDIVIDUALS OF DUE PROCESS RIGHTS BY PERMITTING STATES TO DELEGATE THE POWER OF CIVIL COMMITMENT TO PRIVATE DOCTORS AND HOSPITALS WITHOUT CONSTITUTIONAL SAFEGUARDS	5
II. *CERTIORARI* IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN NUMEROUS STATE AND FEDERAL COURTS	10
III. THE OPINION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT	14
CONCLUSION	21

PAGE

APPENDIX

Opinion of the Court of Appeals for the Second Circuit dated January 27, 1999 ..... 1a

Opinion of the District Court for the Southern District of New York dated May 7, 1998 ..... 4a

Constitutional and Statutory Provisions 32a

TABLE OF AUTHORITIES

Cases PAGE

Addington v. Texas, 441 U.S. 418 (1979 .....5, 15, 17-18

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 12

American Mfrs. Mut. Ins. Co. v. Sullivan, ___ U.S. ___, 119 S.Ct. 977 (1999) 7, 13, 14, 18, 20

Blum v. Yaretsky, 457 U.S. 991 (1982) 12, 13, 15, 17

Brown v. Jenson, 572 F. Supp. 193 (D. Colo. 1983) ... 11

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 11

Collins v. Harker Heights, 503 U.S. 115 (1992)..... 13

Cummings v. Charter Hospital of Las Vegas, 896 P. 2d 1137 (Nev. 1995).....10, 11

Davenport v. Saint Mary Hospital, 633 F. Supp. 1228 (E.D. Pa. 1986) 9-10, 11

Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975). 7

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).....7, 14, 16

Ellison v. Garbarino, 48 F. 3d 192 (6th Cir. 1995)....10, 12

Emmerich v. Thorley, 35 App. Div. 452, 54 N.Y.S. 791 (1st Dep't 1898).....19, 20

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).. 7

Harvey v. Harvey, 949 F. 2d 1127 (11th Cir. 1992)....10, 12

Heryford v. Parker, 396 F. 2d 393 (10th Cir. 1968).... 7

PAGE

Jackson v. City of Joliet, 715 F. 2d 1200 (7th Cir. 1983) 13

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 11-12, 13, 17, 20

Janicsko v. Pellman, 774 F. Supp. 331 (M.D. Pa. 1991), *aff'd without opinion*, 970 F. 2d 899 (3d Cir. 1992) 10, 12

Kay v. Benson, 472 F. Supp. 850 (D.N.H. 1979)..... 11

Lewis v. Law-Yone, 813 F. Supp. 1247 (N.D. Tex. 1993) 12

Lugar v. Edmondson Oil Co,. Inc., 457 U.S. 922 (1982) 9

Marsh v. State of Alabama, 326 U.S. 501 (1946)..... 9

Matter of Carl C., 126 A.D. 2d 640, 511 N.Y.S. 2d 144 (2d Dep't 1987) 19

Matter of Scopes v. Shah, 59 A.D. 2d 203, 398 N.Y.S. 2d 911 (3d Dep't 1977) 19

Meyer v. Nebraska, 262 U.S. 390 (1923) 20

Mills v. Rogers, 457 U.S. 291 (1982)..... 6

Moore v. Wyoming Medical Center, 825 F. Supp. 1531 (D. Wyo. 1993)..... 10

Mountain View Coach Lines, Inc. v. Storms, 102 A.D. 2d 663, 476 N.Y.S. 2d 918 (2d Dep't 1984) 12

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988) 15

O'Connor v. Donaldson, 422 U.S. 563 (1975)..... 5

PAGE

Olmstead v. L.C. ex rel. Zimring, ___ U.S. ___, 119 S.Ct. 2176 (1999) 15

People v. Kan, 78 N.Y. 2d 54, 571 N.Y.S. 2d 436 (1991) 12

Pino v. Higgs, 75 F. 3d 1461 (10th Cir. 1996) 10, 12

Plain v. Flicker, 645 F. Supp. 898 (D.N.J. 1986) 11

Polk County v. Dodson, 454 U.S. 312 (1981).....14, 16

Rendell-Baker v. Kohn, 457 U.S. 830 (1982).....16, 20

Rockwell v. Cape Cod Hospital, 26 F. 3d 254 (1st Cir. 1994).....10, 12

Rubenstein v. Benedictine Hospital, 790 F. Supp. 396 (N.D.N.Y. 1992) 10, 11

Ruffler v. Phelps Memorial Hospital, 453 F. Supp. 1062 (S.D.N.Y.1978) 11, 15

S.P. v. City of Takoma Park, Md., 134 F. 3d 260 (4th Cir. 1998) 10, 12

Seltzer v. Hogue, 187 A.D. 2d 230, 594 N.Y.S. 2d 781 (2d Dep't 1993) 19

Smith v. Allwright, 321 U.S. 649 (1944)..... 18

Snyder v. Albany Medical Center Hospital, 206 A.D. 2d 816, 615 N.Y.S. 2d 139 (3d Dep't 1994).....10, 11, 12

Spencer v. Lee, 864 F. 2d 1376 (7th Cir. 1989) (en banc) 7, 10, 12, 20

Warner v. State of New York, 297 N.Y. 395, 79 N.E. 2d 459 (1948) 19

West v. Atkins, 487 U.S. 42 (1988).....9, 13, 14, 15, 16

PAGE

Willacy v. Lewis, 598 F. Supp. 346 (D.D.C. 1984)..... 11

Youngberg v. Romeo, 457 U.S. 307 (1982)..... 6

Constitutional Provisions

N.Y. Const. Art 6, § 7 (McKinney 1987)..... 3

Statutes and Regulations

N.Y. Mental Hygiene Law (McKinney 1996)
§ 7.07..... 9
§ 9.03..... 18
§ 9.27..... 18
§ 9.37..... 18
§ 9.39..... 18
§ 9.40..... 18
§ 9.41..... 18
§ 9.43..... 18
§ 9.55..... 18
§ 31.02 (a)(2) 9
§ 31.04 (a)(4) 9, 18

1788 N.Y. Laws ch. 31 19

1874 N.Y. Laws ch. 446, § 1 19

14 NYCRR
Part 527 18
Part 580 18

Other Authorities

Brakel, Parry & Weiner, *The Mentally Disabled and the Law* (3 ed. 1985) 17

Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283 (1992)..... 6

PAGE

Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974) 17

Morris, Note. *The Impact of Constitutional Liability on the Privatization Movement after Richardson v. McKnight*, 52 Vand. L. Rev. 489 (1999) 14

Office of Mental Health, *Statewide Comprehensive Plan for Mental Health Services 1993-1997* (October 1, 1992) 8

Petrila, *Ethics, Money and the Problem of Coercian in Managed Behavioral Health Care*, 40 St. Louis U.L.J. 359 (1996) 6

Petrila, *Redefining Mental Health Law*, 16 Law & Human Behav. 89 (1992) 8

Timmons, Note. *Crisis in the Mental Health Care Industry: An Analysis of the Practices of Private For-Profit Psychiatric Hospitals and the Governmental Response*, 31 Houston L. Rev. 323 (1994) 6, 8

IN THE

Supreme Court of the United States

No. 99-____

RHODA OKUNIEFF,

Petitioner,

—against—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioner Rhoda Okunieff respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on January 29, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 166 F. 3d 507 and is set forth in the Appendix to this Petition at 1a-3a.

The opinion of the United States District Court is reported at 996 F. Supp. 343 and is set forth in the Appendix to this Petition at 4a-31a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered an opinion that affirmed the judgment of the District Court on January 29, 1998. The Court of Appeals denied a motion for a rehearing on May 14, 1999. This petition for a writ of *certiorari* is taken pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves an interpretation of the Fourteenth Amendment to the United States Constitution. It also involves the application of New York Mental Hygiene Law §§ 9.03 and 9.27. Also relevant to this appeal is New York Mental Hygiene Law §§ 31.02 (a)(2) and 31.04(a)(4). These provisions are set forth in the Appendix to this Petition at 32a-35a.

STATEMENT OF THE CASE

This case involves one of the most fundamental aspects of the United States Constitution—the right of citizens to be protected by the Due Process Clause when they are deprived of physical liberty as a result of the exercise of sovereign authority that has been delegated by the government to private parties. Specifically, the State of New York not only authorizes, but requires, private hospitals to exercise the

State's police and *parens patriae* powers to civilly commit individuals deemed mentally ill and dangerous.[1] At issue in this case is whether the Constitution protects individuals who have been civilly committed as a result of this delegation of state authority.

Rhoda Okunieff went to a physician for an unrelated medical problem and found herself involuntarily transported to a psychiatric emergency room even though she was not acting dangerously or threatening harm. JA-398-404.[2] She remained involuntarily in the emergency room for two days before she met with two physicians who then executed certificates for involuntary hospitalization after examining her for only ten to fifteen minutes. JA-404-405. Under New York law, a third physician was required to confirm the need for hospitalization. A physician did so without examining her, and Ms. Okunieff was involuntarily hospitalized and remained confined for thirteen days. JA-404-405. When Ms. Okunieff went to New York State Supreme Court to challenge her confinement, as she was entitled under New York law, the judge recognized that Ms. Okunieff did not satisfy the criteria for involuntary hospitalization and ordered the hospital to release her. *Id.*[3]

Proceedings Below

Ms. Okunieff filed a § 1983 lawsuit in the United States District Court for the Southern District of New York. She named as defendants the physicians who effected her involuntary hospitalization under New York law as well as the

---

[1] For a detailed explanation of the State's statutory scheme that requires private participation in the State's civil commitment process, *see infra* at 8-9.

[2] References preceded by "J.A." are to the Joint Appendix filed in the Second Circuit.

[3] In New York, Supreme Court is the court of original jurisdiction and not an appellate court. *See* N.Y. Const. Art 6, § 7 (McKinney 1987).

physician who, without state authority, facilitated the petitioner's involuntary transport to the hospital psychiatric emergency room. The petitioner alleged that the defendants violated her due process rights when they confined her even though she did not pose a danger to herself or others. She sought damages for the allegedly unconstitutional confinement.

The district court granted summary judgment to the physicians on the ground that the civil commitment of the patient did not constitute state action. The court first held that civil commitment does not satisfy the state compulsion test for state action because the state does not compel civil commitments. 13a. In reaching this decision, the court concluded that, notwithstanding the existence of legal standards governing the petitioner's confinement under the Mental Hygiene Law, when determining whether or not to commit, physicians employ medical judgments based upon standards in the medical community. 14a, 18a. The court noted further that the New York Mental Hygiene Law does not "define the standards that a physician must apply when deciding the fate of one facing involuntary commitment." 16a.

The district court then held that civil commitment does not satisfy the close nexus/joint action test because the patient's hospitalization did not involve a situation in which the state was a joint participant in the challenged action. 19a. The court further held that civil commitment does not satisfy the public function test because the committing physicians do not exercise powers that were traditionally the exclusive prerogative of the State, since historically, patients were committed to private asylums. 27a. The court equated civil commitment to a citizen's arrest, the repossession of chattels, and the ejection of trespassers. 28a.

Finally, the district court concluded that civil commitment does not constitute the exercise of State authority. In so holding, the court noted that "the authority which private physi-

cians and private hospitals use to commit an individual is the professional medical standard of the community where the physicians' medical judgments are based." 24a.

Without additional elaboration, the Court of Appeals for the Second Circuit affirmed for "substantially" the reasons set forth in the district court's opinion. 3a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW THREATENS TO DEPRIVE MENTALLY ILL INDIVIDUALS OF DUE PROCESS RIGHTS BY PERMITTING STATES TO DELEGATE THE POWER OF CIVIL COMMITMENT TO PRIVATE DOCTORS AND HOSPITALS WITHOUT CONSTITUTIONAL SAFEGUARDS.

"This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979). Civil commitment constitutes the legitimate exercise of a state's *parens patriae* power to provide care to its citizens who cannot care for themselves, and its police power to protect the community from dangerous tendencies of those who suffer from mental illness. *Id.* at 426. Accordingly, this Court has recognized that the Constitution imposes limitations on a state's authority to confine an allegedly mentally ill individual. *See O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (a state may not involuntarily hospitalize mentally ill person who can survive safely in freedom); *Addington v. Texas,* 441 U.S. at 431-32 (due process requires that state establish by clear and convincing evidence that civil committee suffers from mental illness and poses a danger to herself or others).

A holding that civil commitment does not constitute state action enables allegedly mentally ill individuals to be hospitalized without due process protection. Moreover, the

decision below eliminates other constitutional protections afforded to civilly committed individuals.

The Constitution governs the treatment of a mentally ill person who is hospitalized. *See Mills v. Rogers*, 457 U.S. 291, 299-300 (1982) (right to refuse drugs); *Youngberg v. Romeo*, 457 U.S. 307, 319, 323 (1982) (right to safety, freedom from undue restraint, and treatment that does not substantially depart from accepted professional standards). However, psychiatric hospitals are often inherently coercive environments in which staff members subject patients to abuse, restraints and forced drugging. *See, e.g.*, Timmons, Note. *Crisis in the Mental Health Care Industry: An Analysis of the Practices of Private For-Profit Psychiatric Hospitals and the Governmental Response*, 31 Houston L. Rev. 323, 335 (1994); Petrila, *Ethics, Money and the Problem of Coercian in Managed Behavioral Health Care*, 40 St. Louis U.L.J. 359, 359-60, n.4 (1996).[4] Under the decision of the Second Circuit, the Constitution would not govern any actions of private hospitals or private physicians that harm an individual's interest in bodily autonomy and patients would have no recourse under the Constitution for conduct that violates constitutional standards.

Moreover, involuntarily hospitalized patients would not be assured of having adequate procedural protections to challenge any wrongful confinement. It is well-settled that when the government civilly commits a mentally ill individual, due process requires numerous procedural protections such as the

---

[4] A statement by a leading psychiatrist illustrates the potential for abuse in psychiatric facilities: "No matter what the law does, we'll always [d]rug all the people we want. I hate to say that, but that's my experience. By hook or by crook, most patients will continue to be [drugged].' " Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283, 387 (1992) (quoting Dr. Loren Roth in *Conference Report, Refusing Treatment in Mental Health Institutions: Values in Conflict*, 32 Hosp. & Community Psychiatry 255, 257 (1981)).

right to counsel, *see, e.g. Heryford v. Parker*, 396 F. 2d 393, 396 (10th Cir. 1968), and a prompt hearing. *See, e.g., Doremus v. Farrell*, 407 F. Supp. 509, 517 (D. Neb. 1975) (three-judge court). However, if civil commitment to a private hosptial is not state action, the a mentally ill person committed to a private hospital would have only the protections afforded by state law.[5]

This is particularly problematic because the state action doctrine furthers the constitutional objective of permitting "citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991). However, when private physicians civilly commit an individual, the civil committee is given no choice in the matter. She is confined to the facility to which she is brought.[6] Hence, civil commitment differs from other situations in which citizens voluntarily choose to enter in an arrangement with a private party. *See, e.g., American Manufacturers Mutual Insurance Co. v. Sullivan*, __ U.S. __, __, 119 S.Ct. 977, 983 (1999) (dispute between employees of private company and company's insurance carrier); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 153 (1978) (dispute between debtor and private moving company).

---

[5] It has been suggested that if a mentally ill person committed to a private hospital believes that the procedural protections under state law are unconstitutional, she can challenge their constitutionality. *See Spencer v. Lee*, 864 F. 2d 1376, 1381 (7th Cir. 1989) (en banc). However, if civil commitment to a private hospital is not state action, then the mentally ill person would not suffer of violation of her constitutional rights and would be at the mercy of the procedures that exist under state law.

[6] In the present case, the petitioner was visiting a physician on an unrelated matter at Columbia Presbyterian Medical Center and hospital staff involuntarily transported her to the psychiatric emergency room of the hospital where staff certified her for involuntary hospitalization. *See* JA-402-404.

The State's plan to privatize psychiatric services underscores the need for review of the Second Circuit's decision. The New York State Office of Mental Health anticipates the "virtual elimination" of acute psychiatric care at State operated facilities. Office of Mental Health, *Statewide Comprehensive Plan for Mental Health Services 1993-1997* 125 (October 1, 1992) ("Statewide Comprehensive Plan"). This means that local hospitals, public and private, will provide initial psychiatric treatment and participate in the civil commitment process. To illustrate, in New York, over the last decade, psychiatric beds in local general hospitals have increased nearly 25%. *Id.* at 2. Hence, State employees will effectuate few civil commitments and increasingly, private actors will confine allegedly mentally ill individuals under State law. The decision below enables the State to evade the limitations imposed by the Fourteenth Amendment by compelling greater participation in the commitment process by private physicians and hospitals.

What has occurred in New York is consistent with the changes nationally. Few states rely wholly on public institutions and "[w]hen psychiatric hospitalization does occur, it is likely to be at a private psychiatric hospital or to a psychiatric unit of a general hospital." Petrila, *Redefining Mental Health Law*, 16 Law & Human Behav. 89, 91 (1992). Indeed, while psychiatric hospitalizations at state hospitals have decreased since 1972, "psychiatric admissions to private hospitals and to psychiatric units within general hospitals have increased markedly." *Id; see also* Timmons, *supra,* at 325-326 (at the national level, private psychiatric hospitals almost doubled in the 1980s).

New York is an example of a state that not only authorizes, but compels, private hospitals to increase their role in the commitment process. Under New York law, a private general

hospital cannot operate a psychiatric ward without a certificate of operation from the State Office of Mental Health. New York Mental Hyg. Law § 31.02(a)(2). However, as a condition of renewal of an operating certificate, the State requires a private hospital to serve a catchment, *i.e.*, geographic, area for involuntary psychiatric admissions. N.Y. Mental Hyg. Law § 31.04(a)(4). Hence, as a condition of providing in-patient psychiatric services, the State requires general hospitals, public and private, to assume primary responsibility for emergency psychiatric admissions, an activity that the state would otherwise assume. *See* N.Y. Mental Hyg. Law § 7.07.

Accordingly, the opinion below creates a situation in which mentally ill individuals lack a federal remedy where there has been a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Lugar v. Edmondson Oil*, 457 U.S. 922, 929 (1982). Significantly, the decision below impermissibly enables the State to contract out, or otherwise delegate, its constitutional responsibilities while leaving its citizens no means for vindicating those rights. *See West v. Atkins*, 487 U.S. 42, 56, n.14 (1988).[7] As one court found, such a result warrants a finding of state action:

> Once the state curtails an individual's liberty through the civil commitment process, it assumes affirmative obligations, imposed by the Constitution, for the individual's care and well-being . . . If the state chooses to delegate

---

[7] One can assert that when a citizen interacts with other private individuals, by definition, the Constitution does not protect either party. However, by holding that the contracting out of medical services in a prison does not deprive a prisoner of means of vindicating his Eighth Amendment rights, *see West v. Atkins*, 487 U.S. at 56, this Court has recognized that some rights are governmental in nature and a private citizen does not lose constitutional protection when a state delegates to private parties functions that it would otherwise undertake; *see also Marsh v. State of Alabama*, 326 U.S. 501, 508-09 (1946) (individuals do not lose First Amendment right to distribute religious literature on streets of a company-owned town).

> these responsibilities, and a private hospital chooses to assume them, neither can then argue that the private hospital's acts and omissions do not occur under the color of state law . . . To hold otherwise would allow the state to avoid its constitutional obligations simply by delegating to private hospitals its responsibility for the care of individuals it involuntarily confines [cite omitted], and would render meaningless the recently recognized rights of the involuntarily committed.

Davenport v. Saint Mary Hospital, 633 F. Supp. 1228, 1234 (E.D. Pa. 1986).

II. *CERTIORARI* IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN NUMEROUS STATE AND FEDERAL COURTS.

Whether or not civil commitment is state action is an issue related to fundamental personal liberty that has been litigated extensively for over twenty years. The state courts that have addressed this issue have found that civil commitment constitutes state action. *See Cummings v. Charter Hospital of Las Vegas*, 896 P. 2d 1137, 1145 (Nev. 1995); *Snyder v. Albany Medical Center Hospital*, 206 A.D. 2d 816, 615 N.Y.S. 2d 139, (3d Dep't 1994). These decisions conflict with decisions from the circuit courts that hold that civil commitment is not state action. *See S.P. v. City of Takoma Park, Md.*, 134 F. 3d 260, 270 (4th Cir. 1998); *Pino v. Higgs*, 75 F. 3d 1461, 1465 (10th Cir. 1996); *Ellison v. Garbarino*, 48 F. 3d 192, 196 (6th Cir. 1995); *Rockwell v. Cape Cod Hospital*, 26 F. 3d 254, 258-59, (1st Cir. 1994); *Janicsko v. Pellman*, 774 F. Supp. 331, 339 (M.D. Pa. 1991), *aff'd. without opinion*, 970 F. 2d 899 (3d Cir. 1992); *Harvey v. Harvey*, 949 F. 2d 1127, 1131 (11th Cir. 1992); *Spencer v. Lee*, 864 F. 2d at 1381. The decisions of the Courts of Appeals reversed a trend in which numerous district courts had found that civil commitment is state action. *See Moore v. Wyoming Medical Center*, 825 F. Supp. 1531, 1541 (D. Wyo. 1993); *Rubenstein v. Benedictine Hospital*, 790

F. Supp. 396, 406 (N.D.N.Y. 1992); *Plain v. Flicker*, 645 F. Supp. 898, 908 (D.N.J. 1986); *Davenport v. Saint Mary Hospital*, 633 F. Supp. at 1237; *Kay v. Benson*, 472 F. Supp. 850, 851 (D.N.H. 1979); *Willacy v. Lewis*, 598 F. Supp. 346, 349 (D.D.C. 1984); *Brown v. Jenson*, 572 F. Supp. 193, 197 n.1 (D. Colo. 1983); *Ruffler v. Phelps Memorial Hospital*, 453 F. Supp. 1062, 1068-70 (S.D.N.Y. 1978).

The approaches by the different courts reflect the lack of clarity in state action jurisprudence and the need for guidance on this issue that affects many individuals. The Supreme Court of Nevada concluded that involuntary commitment "is traditionally a public function delegated by the state to private health care providers." *Cummings v. Charter Hospital of Las Vegas*, 896 P. 2d at 1145. Because private health care providers are clothed with the authority of state law, and exercise a power by virtue of such law, they are state actors. *Id.* Other courts that have held that civil commitment is state action have reached their holding through similar analysis. *See, e.g., Snyder v. Albany Medical Center Hospital*, 206 A.D. at 816-17, 615 N.Y.S. 2d at 140 (private physicians can commit only because state has granted them such power); *Rubenstein v. Benedictine Hospital*, 790 F. Supp. at 405-06 (same). As one court recognized, "[i]f the state is not providing the authority to deny an individual his liberty what is providing the authority?" *Plain v. Flicker*, 645 F. Supp. at 905. In this case the district court rejected this reasoning and, without citation, concluded that the authority is derived from the professional medical standard in the community, which is not established by the state. 24a.

The courts that have found that civil commitment does not constitute state action failed to address the issue of the exercise of sovereign authority but applied the four traditional state action tests.[8] Courts have concluded that civil commit-

[8] These tests are as follows: the symbiotic-relationship test, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); the public function test, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352

ment does not satisfy the public function test because, *inter alia*, historically, private individuals could confine mentally ill individuals for care and treatment. *See Rockwell v. Cape Cod Hospital*, 26 F. 3d at 260; *Spencer v. Lee*, 864 F. 2d at 1380-81; *see also Harvey v. Harvey*, 949 F. 2d at 1131; *Lewis v. Law-Yone*, 813 F. Supp. 1247, 1255 (N.D. Tex. 1993). Courts have also concluded that civil commitment is not state action because the government neither compels nor encourages commitments. *See S.P. v. City of Takoma Park, Md.*, 134 F. 3d at 270; *Ellison v. Gabarino*, 48 F. 3d at 196; *Rockwell v. Cape Cod Hospital*, 26 F. 3d at 258; *Harvey v. Harvey*, 949 F. 2d at 1130; *Spencer v. Lee*, 864 F. 2d at 1379. Finally, courts have concluded that a decision to civilly commit a mentally ill person constitutes an exercise in medical judgment that physicians do not make pursuant to state standards. *See S.P. v. City of Takoma Park, Md.*, 134 F. 3d at 270; *Pino v. Higgs*, 75 F. 3d at 1466; *Janicsko v. Pellman*, 774 F. Supp. at 339.

Particularly because of the trend toward privatization, this issue will persist. In New York, because the decision in *Snyder v. Albany Medical Center Hospital* that civil commitment is state action binds all trial courts throughout the State, *see Mountain View Coach Lines, Inc. v. Storms*, 102 A.D. 2d 663, 664, 476 N.Y.S. 2d 918, 920 (2d Dep't 1984), mentally ill individuals will file § 1983 lawsuits in state court. Likewise, in the other circuits in which the Court of Appeals has ruled that civil commitment is not state action, individuals who have suffered violations of their constitutional rights while hospitalized will also turn to state court.[9] These courts will have to choose between the various approaches to the state action question taken by the courts that have addressed this

---

(1974); the nexus test, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); and, the joint participation test. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

[9] Decisions of the circuit courts on this federal question serve as persuasive authority but are not binding on state courts. *See, e.g., People v. Kan*, 78 N.Y. 2d 54, 60, 571 N.Y.S. 2d 436, 439 (1991).

issue. Because of the fundamental interests at stake, this Supreme Court should resolve this issue that has been litigated extensively for over twenty years.

Moreover, by addressing this issue, this case provides this Court with an opportunity to clarify a number of diverse, but ultimately connected, components of state action jurisprudence. First, this case will require this Court to address the role of the State when an individual suffers a deprivation of rights. To date, when addressing the state action issue, this Court has only examined the role of the government when an individual sought constitutional protection for the receipt of services. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353 (provision of utility services); *Blum v. Yaretsky*, 457 U.S. at 1011 (provison of medical services in general); *West v. Atkins*, 487 U.S. at 56 (provision of medical services to prisoner); *American Manufacturuers v. Sullivan*, __ U.S. at __, 119 S.Ct. at 988 (provision workers' compensation benefits). However, the Due Process Clause protects against deliberate "decisions of government officials to *deprive* a person of life, liberty or property." *Collins v. Harker Heights*, 503 U.S. 115, 127, n.10 (1992) (emphasis added). As such, the Constitution has been described as a "charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir. 1983).[10] This case provides this Court with an opportunity to clarify the relationship between the Due Process Clause and the actions of private individuals who deprive individuals of an interest in liberty. While *West v. Atkins* makes clear that the government cannot evade its governmental obligations by contracting out the provision of medical services to prisoners, the varying decisions of the lower

[10] It has been noted that "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services." *Jackson v. City of Joliet*, 715 F.2d at 1203.

courts on the issue at hand establish that it is unclear whether the government can avoid substantive and procedural limitations on its police power and *parens patriae authority* by delegating its sovereign power to private individuals.

This case will also enable this Court to clarify the interrelationship between the functional approach to state action jurisprudence, *see Polk County v. Dodson*, 454 U.S. 312, 320-22 (1981); *West v. Atkins*, 487 U.S. at 56, and the public function doctrine. The decision of the district court illustrates how, to date, courts have been extremely reluctant to examine the function performed by a private citizen, when applying the public function doctrine. *See* 24a. While the traditional state action tests provide a framework for any state action decision, *see supra* note 8, it remains unclear whether the functional approach is simply an alternative way of applying the public function doctrine, *see American Manufacturuers v. Sullivan*, __ U.S. at __, 119 S.Ct. at, 987-88, or is a discrete alternative to the four traditional state action tests. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 624, *Polk County v. Dodson*, 454 U.S. at 320-21.

The need for clarification of these issues is particularly great because of the significant trend toward the privatization of governmental activities. The move toward privatization exists particularly at the state and local level, in such areas as tax collection, the operation of prisons, the operation of hospitals, fire prevention and dispute resolution. *See, e.g.*, Morris, Note. *The Impact of Constitutional Liability on the Privatization Movement after Richardson v. McKnight*, 52 Vand. L. Rev. 489, 492-94 (1999).

III. THE OPINION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Any state action determination requires a court to examine the "essential dichotomy" between public and private acts. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, __ U.S. at __,

119 S.Ct. at 986. Once physicians civilly commit a mentally ill person, they engage in a public, not a private act, as civil commitment is an exercise of a state's *parens patriae* or police power. *Addington v. Texas*, 441 U.S. at 426; *see also Olmstead v. L.C. ex rel. Zimring*, __ U.S. __, __, 119 S.Ct. 2176, 2190 (1999) (States acknowledge that "care of the mentally disabled is their special obligation").[11] Accordingly, civil commitment is activity that has been "traditionally associated with sovereignty" and not actions of a private entity taken "in the course of its business." *Blum v. Yaretsky*, 457 U.S. at 1011.

Civil commitment can be characterized as a typical state action case since it involves a situation in which "the State [has] provided a mantle of authority that enhanced the power of the harm-causing individual actor." *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988). Because civil commitment involves a delegation of state authority and the state has created the legal framework governing the conduct in question, civil commitment is state action. *See id.*

Furthermore, a state action determination requires a court to examine the function undertaken by the private party. For example, in *West v. Atkins*, this Court concluded that a doctor who is under contract with a State to provide medical services in a prison engages in state action not because the State pays him, but because of the "relationship among the State, the physician and the prisoner." 487 U.S. at 56. In so holding, this Court explicitly noted that "the *context* in which respondent

---

[11] As one court noted,

> [t]here can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society . . . Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect "persons under legal disabilities to act for themselves."

Ruffler v. Phelps Memorial Hospital, 453 F. Supp. at 1070 (quoting *O'Connor v. Donaldson*, 422 U.S. at 582-83 (Burger, C.J., concurring).

[physician] performs these services for the State (*quite apart from the source of remuneration*) distinguishes the relationship between respondent and West from the ordinary physician-patient relationship." 487 U.S. at 56, n.15 (emphasis added).

On the other hand, a public defender whom a state also pays is not a state actor. *See Polk County v. Dodson*, 454 U.S. at 320-34. Unlike doctors who commit patients and hence have interests adverse to the individual, public defenders represent the legal interests of their clients and hence, are in an adverse relationship with the state. 454 U.S. at 320-322, 323, n.13.

The courts below failed to examine the relationship among the petitioner, the State, and the private doctors to whom the State delegated its sovereign power. The functions of a doctor who involuntarily hospitalizes a mentally ill person are to "protect *the interest of the public* as well as that of his wards." *Polk County v. Dodson*, 454 U.S. at 319. (emphasis added). In other words, "[i]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Id.* at 319-20.[12] Hence, because private physicians who commit a mentally ill person assume the role of the State, civil commitment is state action. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 844 (1982) (White, J. concurring).

That the State has delegated its authority to confine individuals to doctors at private hospitals "does not change the governmental character of the power exercised." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 626. Accordingly,

---

[12] It is not relevant that this Court in *Polk County* may have been referring to state-employed institutional physicians. *Polk County* and West establish that, when engaging in state action analysis, the source of payment to the professional is not a relevant consideration. Rather, it is the function of the private actor and his role *vis-a-vis* sovereign activity. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 627.

the holding below is also inconsistent with this Court's state action jurisprudence because it misapplied the public function test. The public function test requires a determination of whether the action in question has been " 'traditionally the exclusive prerogative of the State.' " *Blum v. Yaretsky*, 457 U.S. at 1005 (quoting *Jackson v. Metropolitan Edison Co., Inc.*, 419 U.S. at 357.

This Court has recognized that a State may delegate its inherently sovereign power. However, when a states delegates such power, there is still state action and individuals do not lose constitutional protection. As this Court noted in *Jackson v. Metropolitan Edison*, "[i]f we were dealing with the exercise by Metropolitan of some power *delegated to it* by the State which is traditionally associated with sovereignty . . . our case would be quite a different one." 419 U.S. at 352-53 (emphasis added).

The involuntary commitment of an allegedly mentally ill individual is an exercise of sovereign power. "Under English law at the time of the settling of the American colonies, the King had the authority to act as 'the general guardian of all infants, idiots, and lunatics.' " *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1207 (1974) ("Developments in the Law") (quoting H*awaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). This authority was known as *parens patraie*. Developments in the Law, *supra* at 1208. After the American Revolution, the *parens patraie* power was vested in state legislatures. *Id.* The state's police power, also part of the state's sovereign authority, is used to protect the public. *Id.*, at 1222. Hence, any confinement by a private individual is an act that has been delegated by the sovereign since "[t]he State's power to commit individuals rests on the inherent attributes of sovereignty and may be traced to two separate aspects of sovereign authority:" the state's *parens patriae* and police powers. Brakel, Parry & Weiner, *The Mentally Disabled and the Law* 24 (3 ed. 1985); *see also Addington v. Texas*, 441 U.S. at 426 (recognizing

civil commitment involves exercise of state's police and *parens patriae* powers).

This Court's resolution of the state action issue in election cases illustrates the "essential dichotomy" between private and public acts and compels a determination that civil commitment is a public act and hence, state action. While private primary elections are conducted by private political parties, they are done so under state statutory authority, state courts are given exclusive jurisdiction over contested elections, state statutes impose duties on the parties and "the duties do not become matters of private law because they are *performed* by a political party." *Smith v. Allwright*, 321 U.S. 649, 663 (1944) (emphasis added).

The process involving involuntary hospitalization parallels that of the election process. Private physicians can hospitalize patients only under state statutory authority, N.Y. Mental Hyg. Law § 9.03, state statutes determine the standards and procedures for the commitment of allegedly mentally ill individuals, *see* N.Y. Mental Hyg. Law §§ 9.27; 9.37; 9.39; 9.40; 9.41; 9.43; 9.55, state courts determine whether or not patients satisfy the statutory requirements for commitment, N.Y. Mental Hyg. Law § 9.31, and state statutes and regulations impose duties on the committing hospitals in areas ranging from treatment to the assumption of primary responsibility for emergency admissions in certain catchment areas. *See, e.g.*, N.Y. Mental Hyg. Law § 31.04(a)(4); 14 NYCRR Parts 527 and 580. Just as an election does not lose its governmental character when performed by private parties, neither does the civil commitment process.

Unlike *American Manufacturers*, this is not a case of an aggrieved party characterizing State inaction as "authorization or encouragement." __ U.S. at __, 119 S.Ct. at 987. Historically, the respondents could not have taken the action that they did absent a delegation of state authority. Since 1788, state law governed the involuntary confinement of mentally

ill individuals.[13] In addition to statutory law, under common law, any individual could detain a mentally ill person who was causing *immediate* injury. *See, e.g., Warner v. State of New York*, 297 N.Y. 395, 401, 79 N.E. 2d 459, 462 (1948); *Emmerich v. Thorley*, 35 App. Div. 452, 456, 54 N.Y.S. 791, 794 (1st Dep't 1898). *Emmerich* illustrated the type of harm that warranted summary detainment as the person "was actually in the act of throwing herself out of a window to escape fancied pursuers." *Warner v. State of New York*, 297 N.Y. at 401, 79 N.E. 2d at 462. However, under the existing state commitment law and the federal Constitution, a person is committable when she poses simply a substantial *threat* of physical harm. *See, e.g., Matter of Scopes v. Shah*, 59 A.D. 2d 203, 205-206, 398 N.Y.S. 2d 911, 913 (3d Dep't 1977); *Matter of Carl C.*, 126 A.D. 2d 640, 640, 511 N.Y.S. 2d 144, 145 (2d Dep't 1987). Under the State's civil commitment law, a hospital may confine a person who is not creating an imminent risk of harm but who poses a threat of harm in the future. For example, a psychiatric hospital may confine a mentally ill person who is not presently creating a risk of harm but who may cause harm in the future because he has a history of noncompliance with medication and may stop taking medication if released from the hospital. *See Seltzer v. Hogue*, 187 A.D. 2d 230, 237-38, 594 N.Y.S. 2d 781, 785 (2d Dep't 1993).[14]

Furthermore, even at common law, the respondents would have needed state authority to confine the petitioner for thir-

---

[13] In 1788, New York authorized city or town officials, upon a warrant issued by two justices, to lock up a "lunatic or mad person." 1788 N.Y. Laws ch. 31. In 1874, New York passed a law authorizing the commitment of a mentally ill person upon the certificates of two physicians but requiring a court to approve any confinement longer than five days. 1874 N.Y. Laws ch. 446, § 1.

[14] A reading of the record below details that the respondents never asserted that the petitioner was causing immediate injury. Rather, the respondents believed that the petitioner might cause harm sometime in the future. *See* JA-165-168; 175-176; 401-405.

teen days. At common law, if someone restrained a mentally ill person, it was his or her duty to "at once . . . invoke the agencies established by law for the care and protection of the insane, and to institute that proceeding which was required to authorize her further detention." *Emmerich v. Thorley*, 35 App. Div. at 457, 54 N.Y.S. at 794.

Ultimately, a determination as to whether respondents could have acted in the absence of state authorization turns on the meaning of liberty within the Constitution. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Common law permitted an insurance company to defer payment pending substantiation of its reasonableness, *see American Manufacturers*, U.S. __ at __, 119 S. Ct. at 987, and the utility company in *Jackson v. Metropolitan Edison* was at liberty to build a business and provide utility services. *See* 419 U.S. at 354, n.9; *see also Rendell-Baker v. Kohn*, 457 U.S. at 840-41 (private school not fundamentally different than other corporations that contract with the government). Notwithstanding the ability of relatives to lock up a mentally ill person in eighteenth century England, *see Spencer v. Lee*, 864 F. 2d at 1380-81, the law in New York dating back to 1788 did not permit physicians or anyone else, in the absence of state authority, to (1) confine a mentally ill person who was not presenting an immediate risk of harm for any period of time, and (2) lock up a mentally ill person for thirteen days even if the person was creating an immediate risk of harm. *See supra* at 19.

CONCLUSION

For the reasons given in this petition, this Court should grant this petition for *certiorari*.

Dated: Huntington, New York
September 8, 1999

WILLIAM M. BROOKS
(*Counsel of Record*)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1065—August Term, 1998

(Argued: January 13, 1999 Decided: January 29, 1999)

Docket No. 98-7803

RHODA OKUNIEFF,

Plaintiff-Appellant,

—v.—

R. ROSENBERG, M.D., personally, ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ACROW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity as head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Defendants-Appellees.

Before:

JACOBS and SOTOMAYOR, *Circuit Judges*, and SAND, *District Judge*.*

---

* The Honorable Leonard B. Sand of the United States District Court for the Southern District of New York, sitting by designation.

After being involuntarily committed to the psychiatric ward at Columbia Presbyterian Medical Center, Okunieff filed suit in the United States District Court for the Southern District of New York (Sweet, *J.*) alleging, under 42 U.S.C. § 1983, that her commitment constituted a violation of her rights under the Fourth and Fourteenth Amendments. The district court dismissed the action on the ground that the defendants, all private individuals or entities, had not acted under color of state law. On appeal, the plaintiff challenges that decision, as well as certain discovery rulings made by the district court.

Affirmed.

WILLIAM M. BROOKS, Huntington, NY (Mental Disability Law Clinic, Touro College, Jacob D. Fuchsberg Law Center, on the brief), *for Plaintiff-Appellant.*

BARRY I. LEVY, New York, NY (Lewis Rosenberg, Angela Thompson-Tinsley, Shapiro, Beilly, Rosenberg, Albert & Fox, LLP, on the brief), *for Appellee Richard Rosenberg, M.D.*

PATRICIA D'ALVIA, New York, NY (Gregory J. Radomisli, Peter T. Crean, Martin, Clearwater & Bell, on the brief), *for Remaining Appellees.*

PER CURIAM:

On May 5, 1996, Rhoda Okunieff was involuntarily committed to the psychiatric ward at Columbia Presbyterian Medical Center. After successfully challenging her confinement pursuant to § 9.31 of New York's Mental Hygiene Law, she was released on May 16, 1996. She then brought suit alleging, under 42 U.S.C. § 1983, that her physician, as well as Columbia Presbyterian and several of Columbia Presbyterian's employees—all private individuals or entities—had violated rights secured to her by the Fourth and Fourteenth Amendments to the Constitution. Okunieff's complaint also contained several state law causes of action.

The district court, granting the defendants' motion for summary judgment, dismissed Okunieff's § 1983 claim on the ground that the defendants are not state actors and that they therefore did not act under color of state law. *See Okunieff v. Rosenberg*, 996 F. Supp. 343, 348-58 (S.D.N.Y. 1998). The court dismissed Okunieff's state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994). *See id.* at 358. On appeal, Okunieff challenges the district court's conclusion that the defendants are not state actors. She also challenges certain of the district court's discovery rulings.

On the question of whether the defendants acted under color of state law, we affirm for substantially the reasons set forth in the district court's comprehensive and scholarly opinion. We further conclude that the district court did not abuse its discretion in denying Okunieff the discovery she sought.

The judgment is therefore affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
97 Civ. 3205 (RWS)

RHODA OKUNIEFF,

Plaintiff,

—against—

R. ROSENBERG, M.D., personally, ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Defendants.

APPEARANCES:

TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Attorney for Plaintiff
300 Nassau Road
Huntington, NY 11743

By: WILLIAM M. BROOKS, ESQ.
Of Counsel

SHAPIRO, BEILLY, ROSENBERG, ALBERT & FOX
Attorney for Defendant Richard Rosenberg, M.D.
225 Broadway—Suite 1115
New York, NY 10007

By: LEWIS ROSENBERG, ESQ.
BARRY I. LEVY, ESQ.
ANGELA THOMPSON-TINSLEY, ESQ.
Of Counsel

MARTIN, CLEARWATER & BELL
Attorney for Remaining Defendants
220 East 42nd Street
New York, NY 10017
By: PETER T. CREAN, ESQ.
GREGORY J. RADOMISLI, ESQ.
TIFFANY L. BAUMAN, ESQ.
Of Counsel

OPINION

Sweet, D.J.

Defendants Anne Skomorossky, M.D., Lorraine Innes, M.D., Stan Arcow, M.D., Elizabeth Mirabello, M.D., Presbyterian Hospital in the City of New York, s/h/a Columbia Presbyterian Medical Center, and Herbert Pardes, M.D. (individually, "Rosenberg," together with the Hospital Defendants, the "Defendants") have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P., in this action filed by Plaintiff Rhoda Okunieff ("Okunieff") on the grounds that they are not state actors, and therefore Okunieff's claim pursuant to 42 U.S.C. § 1983 must fail. Defendants also seek an Order dismissing Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(c)(3).

For the reasons set forth below, (1) Defendants' motions for summary judgment are granted, and (2) Plaintiff's state law claims are dismissed.

Parties

At the time relevant to this action, Rhoda Okunieff was enrolled in a Masters Degree program in Biostatistics at Columbia University and a Masters Degree program in Mathematics at New York University.

Defendant Columbia Presbyterian Medical Center ("CPMC") is a private medical institution doing business as a private corporation.

Defendant Anne Skomorossky, M.D. was, at the time relevant to this action, a resident at CPMC.

Defendant Lorraine Innes, M.D., Stan Arcow, M.D., and Elizabeth Mirabello, M.D., are private attending physicians with privileges at CPMC.

Herbert Pardes is the head of the Department of Psychiatry at CPMC.

Defendant Rosenberg is a private physician with privileges at CPMC.

Defendant Rosenberg is a private physician with privileges at CPMC.

Prior Proceedings

Okunieff filed this action pursuant to 42 U.S.C. § 1983 on May 2, 1997. The complaint was amended on May 19, 1997. This action arises out of the involuntary psychiatric hospitalization of Okunieff. The complaint alleges violation of Plaintiff's civil rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Okunieff also has filed pendent state law claims, including false imprisonment, and violations of Plaintiff's rights to informed consent, to determine Okunieff's own course of treatment, and to confidentiality.

The instant summery judgment motion by Rosenberg was filed on October 10, 1997, and the motion by the Hospital Defendants was filed November 10, 1997. Argument on both motions was heard on March 12, 1998, at which time the motions were considered fully submitted.

Facts

On April 30, 1996, Okunieff went to Rosenberg's office on Port Washington Avenue for a general physical exam. Rosenberg, at that time, maintained private offices at 161 Fort Washington Avenue and 903 Park Avenue, New York, New York. Okunieff was independently referred to Rosenberg through her insurance company, Oxford Health Plans (the "Oxford Plan"). Rosenberg participated as a primary care physician under the Oxford Plan. This was Okunieff's first visit to Dr. Rosenberg.

Rosenberg's examination of Okunieff revealed that she had been under a lot of stress for a significant period of time, relating to her job and educational responsibilities as well as her personal life. She had also been experiencing depression and crying spells. During the examination, Okunieff began exhibiting symptoms indicative of psychotic behavior. According to Rosenberg, Okunieff told Rosenberg that her parents (who live in Michigan) had been entering her New York apartment and had placed things such as salad dressing and ketchup around her apartment. Okunieff also advised Rosenberg that her employer had suggested she seek psychiatric help.

It was Rosenberg's medical opinion that Okunieff needed immediate psychiatric treatment. Rosenberg arranged for Okunieff to meet with Dr. Judith Lewis, a private psychiatrist, on May 2, 1996. At that point, Okunieff left Rosenberg's office.

Okunieff failed to keep the appointment with Dr. Lewis because she did not know Dr. Lewis and her fees were high. Dr. Lewis contacted Rosenberg on May 2 or 3, 1996, informing him that Okunieff had failed to appear for her appointment. Rosenberg's secretary called Okunieff on the morning of May 3, 1996, asking Okunieff to come to Rosenberg's office. Okunieff agreed, as she wanted to obtain results of her blood test. She, however, was concerned that she would be late for another appointment she had with a gynecologist. Upon Okunieff's arrival, Rosenberg observed that her psy-

chological condition had severely deteriorated since he last saw her on April 30, 1996.

When Rosenberg asked Okunieff to discuss her situation, she appeared frightened to enter his office and ran away as Rosenberg attempted to speak with her in the hallway. It was Rosenberg's medical opinion that Okunieff was experiencing a paranoid psychotic episode and presented a potential danger to herself. Rosenberg then called Dr. Lewis to discuss Okunieff and her behavior. Dr. Lewis recommended that Rosenberg try to locate Okunieff and have her escorted by hospital security to the psychiatric emergency room for an evaluation. Rosenberg wrote a medical order authorizing hospital security to transport Okunieff to CPMC. Rosenberg is not an employee of CPMC. He merely has privileges there.

Okunieff reappeared momentarily. Again, when Rosenberg attempted to speak with Okunieff, she became agitated and ran out of the office. Rosenberg then alerted security, suspecting that Okunieff would return. According to Okunieff, she left Rosenberg's office because she did not want to discuss her blood test results in the waiting room, and she did not want to be late for her gynecological appointment. She maintains that at no time did she appear agitated in the presence of Rosenberg, nor was she a threat to herself or others.

When Okunieff once again returned to Rosenberg's office, security officers had arrived. Rosenberg advised Okunieff that she would be escorted to the psychiatric emergency room so that she could be evaluated. According to Rosenberg, Okunieff's delusions became so severe that she accused him of being an imposter. Okunieff again ran away and was later found lying on the floor of the adjacent hospital building. The supervising nurse of the hospital building requested that Rosenberg sign an order permitting the use of four-point restraints, if necessary. Rosenberg signed the order, but such restraints proved unnecessary. Okunieff was escorted to CPMC without them.

At the CPMC psychiatric emergency room, Okunieff met with Drs. Anne Skomorossky and Lorraine Innes. Both physi-

cians certified Okunieff for involuntary commitment after concluding that she was dangerous and no adequate alternate forms of treatment existed at that time, as is required under the New York Mental Hygiene Law ("MHL") § 9.27 (McKinney 1996). For Okunieff's commitment to meet the MHL requirements, a staff physician must confirm the two physicians' evaluation. Dr. Stan Arcow executed such confirmation. Okunieff was committed on May 5, 1996. Pursuant to the MHL, Okunieff challenged her confinement and requested a hearing. On May 16, 1996, CPMC was directed to release Okunieff. It did so later that day.

None of the physicians above is a state employee, and CPMC is a private hospital that is licensed to provide emergency psychiatric services and treat mentally disabled persons.[1]

Discussion

I. Standard for Summary Judgment

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Silver v. City University*, 947 F.2d 1021, 1022 (2d Cir. 1991).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060 (2d Cir. 1995). In determining whether a genuine issue

---

[1] Under MHL § 31.02, general hospitals may not operate a psychiatric wing without an operating license issued by the New York State Office of Mental Health ("OMH"). CPMC had such a license. CPMC also was licensed by the OMH Commissioner to operate a comprehensive psychiatric emergency program ("CPEP") under MHL § 31.27. A CPEP serves as a primary psychiatric emergency provider.

of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. v. Zenith Radio Corp*, 475 U.S. 574, 587 (1986); *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988). If there is any evidence in the records regarding the issues on which summary judgment is sought from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. *See Knowles v. New York City Dept. Of Corrections*, 904 F. Supp. 217, 220 (S.D.N.Y. 1995).

A party seeking to defeat a summary judgment motion cannot "rely on mere speculation or conjecture as to the true nature of facts to overcome the motion." *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986). Rather, the responding party "must show the existence of a disputed material fact in light of the substantive law." *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 564 (S.D.N.Y. 1995). In the absence of any disputed material fact, summary judgment is appropriate.

II. *Summary Judgment Is Granted Because the Defendants Are Not State Actors*

Section 1983 of Title 42 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C.A. § 1983 (West Supp. 1997). The constitutional sections creating the substantive rights in this case are the Fourth and Fourteenth Amendments. Because the Amendments are directed at the States, they can be violated only by "state action" and not by the conduct of a private actor.

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982). Section § 1083's "under color of law" requirement is treated " 'as the same thing' as the 'state action' " requirement under the Constitution. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (quoting *United States v. Price*, 383 U.S. 787, 794 n.7 (1966)).

To prevail in this § 1983 action, Okunieff must show (1) that Defendants deprived her of a right secured by the Constitution or laws of the United States and (2) that, in doing so, Defendants acted under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978). As to the first requirement, it has been established that involuntary confinement—or civil commitment—constitutes a significant deprivation of liberty requiring due process protection. *See Addington v. Texas*, 441 U.S. 418, 425 (1979). The critical issue in this case, however, is not whether Okunieff has a liberty interest in being free from unwarranted confinement, but whether the actions of a private physician, Defendant Rosenberg, who authorized the transport of Okunieff to CPMC for psychiatric evaluation, and the actions of the Hospital Defendants, who committed Okunieff could be considered the actions of the State for the purposes of liability under 42 U.S.C. § 1983. According to Okunieff, Defendants are state actors because they derived the authority to commit her from the laws of New York State.

"The ultimate issue in determining whether [the Defendants are] subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?' " *Rendell-Baker*, 457 U.S. at 838 (quoting *Lugar*, 457 U.S. at 937). For conduct of the Defendants to be fairly attributable to the State, Defendants must be state actors. *See Lugar*, 457 U.S. at 937. In the instant case, the group of Defendants consists of private physicians and a private hospital. "Only in rare circumstances can a private party be

viewed as a 'state actor' for section 1983 purposes." *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). The Supreme Court has developed a number of approaches to determine whether a private party's conduct may constitute state action, including (1) the state compulsion test, (2) the close nexus/joint action test, and (3) the public function test.

Under the state compulsion test, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc.*, 436 U.S. at 164-65). The close nexus/joint action test requires Plaintiff to demonstrate " 'a sufficiently close nexus between the State and the challenged action of the (private) regulated entity so that the action of the latter may be fairly treated as that of the State itself.' " *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Finally, the public function test is satisfied if the private party performs a function that is " 'traditionally the exclusive prerogative of the State.' " *Id.* at 1005 (quoting *Jackson*, 419 U.S. at 353).

These three tests have been employed by various courts of appeals to determine whether involuntary commitment by private parties pursuant to state statute converts private conduct into state action for purposes of § 1983. The First, Third (by affirming the district court opinion), Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits all agree that such action does not constitute state action. *See S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Pino v. E.P. Higgs, 75 F.3d* 1461 (10th Cir. 1996); *Ellison v. A.J. Garbarino, M.D.*, 48 F.3d 192 (6th Cir. 1995); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 257-60 (1st Cir. 1994); *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992); *Janicsko v. Pellman*, 774 F. Supp. 331 (M.D. Pa. 1991), *aff'd without opinion*, 970 F.2d 899 (3d Cir. 1992); *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (en banc). The issue has not heretofore been presented to the Second Circuit. The facts of this case lead to the same conclu-

sion. Application of the state compulsion, public function, and close nexus tests below reveals the absence of state action.

A. *The Hospital Defendants Are Not State Actors*

1. *State Compulsion*

The Hospital Defendants are not state actors because the MHL neither compels nor encourages involuntary commitment "any more than repossession laws are passed because states want to encourage creditors to repossess their debtors' goods." *Spencer*, 864 F.2d at 1379. Okunieff was committed pursuant to § 9.27 of the MHL, which by its terms is permissive, not mandatory. *See, e. g., Rockwell*, 26 F.3d at 258 (finding no state compulsion where Massachusetts statute did not compel or encourage involuntary commitments). Like similar state statutes under which state compulsion was lacking, New York's MHL simply sets forth a mechanism to effect involuntary commitments when necessary. *See S.P.*, 134 F.3d at 269-70; *Ellison*, 48 F.3d at 196; *Rockwell*, 26 F.3d at 258; *Harvey*, 949 F.2d at 1130-31; *Janicsko*, 774 F. Supp. at 338-39. The language of MHL § 9.27 is not one of compulsion. MHL § 9.27(a) states:

> The director of a hospital *may* receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

MHL § 9.27(a) (emphasis added). The use of the word "may" is convincing of the lack of encouragement or exercise of coercive power by the state, factors that must exist under the state compulsion test.[2] *See Blum*, 457 U.S. at 1004. Even

[2] Courts have even found state compulsion lacking despite existence of coercive language in state statutes comparable to the MHL.

though the MHL provides the legal framework under which physicians may involuntarily commit a patient by creating procedures and standards for commitment, as Okunieff points out, it leaves the decision to commit completely to the physician's discretion. *See Janicsko*, 774 F. Supp. at 338-39 (finding significant that physicians retained discretion to determine when commitment is necessary under the Pennsylvania Mental Health Procedures Act).

According to Okunieff, New York State exercises coercive authority because a person may be involuntarily committed only pursuant to the MHL. However, the state compulsion inquiry does not focus on whether commitment may be effectuated only by statute but whether the State compels the action of involuntary commitment. The Hospital Defendants, and not the State, exercised professional medical judgment to determine whether Okunieff needed to be committed. As the Supreme Court held in *Blum*, 457 U.S. at 1008, a state is not liable for determinations that "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Blum* regarded a suit against the Commissioner of New York State Department of Public Services based on actions of a privately operated nursing home that had downgraded the plaintiff

---

Maryland's involuntary commitment statute states that "[i]f an emergency evaluee meets the requirements for involuntary admission and is unable or unwilling to agree to a voluntary admission . . . , the examining physician *shall* take the steps needed for involuntary admission." *S.P.*, 134 F.3d at 269 (quoting Md. Code Ann., Health-Gen. I § 10-625(a) (1994)). The Fourth Circuit held that although the statute uses language which suggests a degree of coercion, the entire involuntary commitment scheme in Maryland is permissive and leaves much discretion to the private physician or hospital. *See id.* at 270. Likewise, because of the word "shall" in the Pennsylvania statute, the court in *Janicsko* noted that the statute "does not clearly allocate all the discretion of commitment to a physician, and, in fact, uses language which suggests a degree of coercion." *Janicsko*, 774 F. Supp. at 338. Regardless, the court found that the "shalls" related to the necessity of emergency treatment and were included to offer more protection to the person to be committed rather than to compel civil commitment by private actors.

Medicaid patients from a high level to a lower level of care. Although the State subsidized the nursing homes, extensively regulated and licensed them, and paid patient expenses, the Supreme Court held that the home's decision to discharge patients to other nursing homes that provided a lower level of care was made in its capacity as a private entity according to private professional, and not state-mandated, standards. *See id.* "[P]hysicians, and not the forms make the decision about whether a patient's care is medically necessary . . . . We cannot say that the State, by requiring completion of a form, is responsible for the physician's decision." *Id.* at 1006-07. Here too, the private physicians employed medical judgment based on standards accepted in the medical community when rendering their decision. MHL § 9.27 provided the procedure the physicians were to follow for a valid commitment; for example, the statue requires certificates by two physicians, MHL § 9.27(a), and asks that the physicians consider alternative forms of treatment and care before committing a patient, MHL § 9.27(d). The MHL does not, however, contain comprehensive standards or definitions that may be applied by rote, leading a physician to the conclusion that involuntary commitment is, or is not, warranted in any given case.

Okunieff relies on the Second Circuit's opinion in *Catanzano v. Dowling*, 60 F.3d 113 (2d Cir. 1995), in contending that the standards set forth in the MHL replaced the judgment of the private physicians. In *Catanzano*, Medicaid patients challenged decisions to reduce health care services made by certified home health care agencies ("CHHAs"), agencies licensed by New York State to provide home health care services under Medicaid. 60 F.3d at 115. The Second Circuit found the CHHAs to be state actors because, *inter alia*, CHHAs are required to evaluate all potential recipients of care; CHHA decisions are made pursuant to standards defined by the Department of Health in regulations; the statute provides the specific alternatives the CHHA must consider when making efficiency determinations mandated by statute; and the State commands denial of treatment if the CHHA con-

cludes after applying the standards set by the statute that home health care is inappropriate. *See id.* at 119. The coercive power and significant encouragement by the State in *Catanzano* is absent in the instant case. Unlike the statute governing the CHHAs, the MHL does not require commitment, set forth the alternatives a physician must consider before ordering commitment, or define the standards a physician must apply when deciding the fate of one facing involuntary commitment.

New York's MHL states:

> "in need of involuntary care and treatment" means that a person has a *mental illness* for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment.
>
> "Likelihood to result in serious harm" or "likely to result in serious harm" means (a) a *substantial risk* of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a *substantial risk* of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear or serious physical harm.

MHL § 9.01, Definitions. Neither "mental illness" nor "substantial risk" is defined. Instead, private physicians must apply generally accepted standards of the medical community to determine whether a patient has a "mental illness" or poses a "substantial risk" to oneself or others. *Cf. Janicsko*, 774 F. Supp. at 339 (finding that despite the extensive definition of the term "severely mentally disabled" in the Pennsylvania Mental Health Procedures Act, the statute "nevertheless leaves a sufficient degree of this determination to the discretion of a medical practitioner using the non-governmentally imposed criteria of the medical profession").

The professional medical judgment exercised by the Hospital Defendants in the instant case is akin to that exercised under MHL § 9.39. The Second Circuit has held that § 9.39 incorporates the medical community's generally accepted standards as a matter of law. *See Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995). The plaintiff in *Rodriguez* was involuntarily committed pursuant to MHL § 9.39, which provides that a person "alleged to have a mental illness for which immediate observation, care, and treatment in the hospital is appropriate," may be admitted if a hospital staff physician finds that the mental illness "is likely to result in serious harm" to the individual or others.[3] MHL § 9.39. The *Rodriguez* court confronted the issue of whether the defendants, a city hospital, a resident of the city hospital, and the attending physicians of the city hospital, complied with § 9.39. *See Rodriguez*, 72 F.3d at 1053. The parties' expert physicians had testified to differing definitions of the generally accepted meaning within the medical community of § 9.39's use of "threat[ ] . . . . of suicide" and "conduct demonstrating [that a person] is dangerous to himself." *Id.* at 1057. The Second Circuit held that the district court below had

> correctly interpreted § 9.39 as "implicitly defer[ring] to medical judgment," and it correctly construed that section as "requir[ing] a physician to make a medical decision, guided by standards that are generally accepted within the medical community." Implicit in § 9.39's requirement that the decision be made by a physician is the premise that the decision will be made in accordance with the standards of the medical profession.

Id. at 1062-63 (citations omitted).

---

[3] MHL § 9.39 defines "likelihood to result in serious harm" to include, *inter alia*, "substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself." MHL § 9.39.

As Okunieff acknowledges, although § 9.27 does not require a finding of dangerousness on its face (unlike § 9.39, New York courts have recognized that a person cannot be committed unless deemed dangerous, *i.e.*, by posing a substantial threat of harm to his or her person or others. *See, e.g., Matter of Scopes v. Shah*, 59 A.D. 2d 203, 205-06, 398 N.Y.S. 2d 911, 913 (3d Dep't 1977). Because the analysis physicians employ for commitments under § 9.39 must also be employed for commitments under § 9.27, it follows that, given *Rodriguez*, as a matter of law the Hospital Defendants exercised professional judgment, guided by generally accepted standards in the medical community, in determining that Okunieff required involuntary commitment pursuant to MHL § 9.27.[4]

Compliance with the procedures of the MHL, a statute that neither forces nor encourages involuntary commitments, does not convert private action into state action. New York's involuntary commitment scheme puts in place due process safeguards for the protection of the person confronted with involuntary confinement—hence, the requirement of evaluations by more than one physician and the reminder to physicians that they consider alternate routes of treatment. The actual decision of whether commitment is warranted, however, is left entirely to the sound medical judgment of physicians. Therefore, the actions of the Hospital Defendants cannot be attribute to the State under a theory of state compulsion.

2. *Close Nexus/Joint Action*

The MHL does not create a sufficiently close nexus between the State and Hospital Defendants to mandate their

---

[4] Peter Stastny, M.D., states in an Affidavit submitted by Okunieff that the determination of "dangerousness" requires a social, rather than a medical, assessment. Dr. Stastny's Affidavit is unhelpful in this summary judgment notion since, as the Second Circuit concluded in *Rodriguez*, the interpretation of the MHL—and the amount of discretion afforded to physicians—is a question of law and not fact.

classification as state actors. The fact that CPMC has a contract with the OMH that enables CPMC to operate a psychiatric wing and is licensed by the OMH Commissioner to serve as a primary psychiatric emergency care provider does not render the Hospital Defendants state actors. According to the Supreme Court, "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed . . . do so." *Jackson*, 419 U.S. at 350 (citation omitted); *see Rockwell*, 26 F.3d at 258 (holding that private hospital and physicians who involuntarily committed plaintiff under Massachusetts state were not state actors, noting that state regulation, even if extensive, and receipt of federal funds do not establish state action); *Harvey*, 949 F.2d at 1132 (finding licensing and regulation insufficient to transform private hospitals into state actors for purposes of § 1983 liability). The purpose of the close nexus requirement is to "assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004. This assurance is especially important where the plaintiff seeks to subject private parties to § 1983 liability by bestowing on them the title of state actors.

The instant case does not involve a situation where the state has " 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.' "[5] *Harvey*, 949 F.2d at 1131 (quoting *NBC v. Communication Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988) (citation omitted)). The Eleventh Circuit in *Harvey*, confronting facts similar to the case at bar and the issue of whether involuntary commitment by private parties may be considered state action, found an insufficient nexus between the defendants, a private hospital and private

---

[5] As described in the discussion of state complusion, the MHL leaves the decision to commit in the hands of the physician.

physicians, and the State. *See id.; see also Rockwell*, 26 F.3d at 258 (holding that Massachusetts statute did not create a sufficiently close nexus between private hospital and the State to warrant labeling private actors state actors). The court observed that "[b]oth the Supreme Court and our predecessor circuit have concluded that such a nexus is lacking in circumstances much more compelling than the circumstances in this case." *Id.* (referring to *Rendell-Baker* and *Blum*).

In *Rendell-Baker*, the Supreme Court examined the relationship between the State of Massachusetts and a private school in a § 1983 claim brought by discharged teachers. The private school, which taught special needs children, received 90% of its funds from the State and was extensively regulated in personnel matters by state-imposed guidelines. The Court refused to attribute the teachers' discharges to state action. *See Rendell-Baker*, 457 U.S. at 840-43. Similarly, the Supreme Court in *Blum* found that despite extensive state regulation and funding of private nursing homes, state action could not be maintained. *See Blum*, 457 U.S. at 1004.

Thus, because the MHL merely licenses private physicians and hospitals to commit involuntary commitments yet in no way influences the decisions to commit, its relationship with the Hospital Defendants is insufficient to pass the close nexus/joint action test.

2. *Public Function*

Involuntary commitment under the MHL fails the public function test because the powers exercised by the Hospital Defendants are not the sort that were "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353. This exclusion function theory is related to situations where the State delegates its responsibilities to private parties and then attempts to escape liability for constitutional violations caused by private parties acting pursuant to the delegation. *See Rockwell*, 26 F.3d at 258. This is not what New York State did in allowing physicians to decide whether involuntary commitment is in the best interests of a patient. The

responsibility for invalid commitment lies with the physician as a private individual. Very few activities are "exclusively reserved to the states." *Flagg Bros., Inc.*, 436 U.S. at 158-59; *see White v. Scrivner Corp.*, 594 F. 2d 140, 142 (5th Cir. 1979) (noting that even arrest, search, and detention are not exclusively reserved to states). Election is one such area. See *Flagg Bros., Inc.*, at 158. Involuntary commitment is not. *See Rockwell*, 26 F.3d at 258-60 (unwilling to categorize involuntary commitment in Massachusetts as a public function); *Harvey*, 949 F.2d at 1131 (same regarding Georgia statute).

According to Okunieff, the public function test is satisfied because involuntary commitment is a function of New York State in that New York authorizes confinement of the mentally ill. Okunieff, however, does not take the analysis far enough. As the Supreme Court declared in *Rendell-Baker*, "our holdings have made clear that the relevant question is not simply whether a private group is serving *a* 'public function.' We have held that the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.' " 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 352 (emphasis added)); *see Rockwell*, 26 F.3d at 258 (finding that involuntary commitment is not a public function, and stating: "In order for a private actor to be deemed to have acted under color of state law, it is not enough to show that the private actor performed *a* public function. The plaintiff must show that the private entity assumed powers 'traditionally *exclusively* reserved to the State.' " (quoting *Jackson*, 419 U.S. at 352 (emphasis added)). The fact that the private party has powers coextensive with the state is irrelevant to determine that state action exists. *See Harvey*, 949 F.2d at 1131. Exclusivity is required.

Okunieff misstates *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), to support her contention that the exclusivity test required by the Supreme Court should not be followed. In *Edmonson*, the Court held that a private litigant in a civil case may not use preemptory challenges to challenges to exclude jurors on account of race. The Court found

that the action in question was the performance of a traditional governmental function due to that distinct nature of peremptory challenges. The Court stated that "the peremptory challenge has no utility outside the jury system, a system which the government *alone* administers." *Id.* at 622 (emphasis added). In addition, Okunieff's reliance on *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979) to circumvent the exclusivity prong of the public function test is similarly misplaced. The case actually supports the use of "exclusivity". The Second Circuit in *Janusaitis* relied on *Flagg Bros., Inc.* and held that fire protection has traditionally been the exclusive function of the state and thus constitutes state action if performed by a private entity. *See id.* at 22. The court quoted *Flagg Bros., Inc.* when it stated the "[a]mong (such exclusive municipal functions) are such functions as education, fire and police protection, and tax collection." *Id.* (quoting *Flagg Bros., Inc.*, 436 U.S. at 163-64).

Two district court cases in New York have abandoned the exclusivity requirement to find that involuntary commitment is indeed a public function. *See Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396 (N.D.N.Y. 1992); *Ruffler v. Phelps Memorial Hosp.*, 453 F. Supp. 1062 (S.D.N.Y. 1978). The *Ruffler* court held that New York Hospital, a private hospital, had engaged in state action by involuntary confining plaintiff pursuant to the MHL. *See id.* at 1067-71. The *Ruffler* decision found that involuntary confinement was a public function in New York because of the legislature's assumption of responsibility for the mentally ill in § 7.01 of the MHL[6] and its extensive regulation of private agencies which provide mental health services. *See id.* at 1069. However, Ruffler concluded existence of state action on a theory that civil commitment is a matter of public concern without a finding of "exclusivity". This contention is contrary to the Supreme

---

[6] MHL section 7.01 states: "The state of New York and its local governments have the responsibility for the prevention and early detection of mental illness and for the comprehensively planned care, treatment and rehabilitation of their mentally ill citizens."

Court's analyses in *Flagg Bros., Inc., Jackson, Rendell-Baker*, and *Blum*. The Eleventh Circuit criticized the Ruffler court because it "only inquired as to the public nature of the function and did not determine if exclusivity existed." *Harvey*, 949 F.2d at 1131 n. 10. In addition, contrary to *Ruffler*, extensive regulation does not make involuntary confinement an exclusive state function. In *Rendell-Baker*, plaintiffs asserted that the private school for maladjusted high school students performed a traditional public function because of extensive state regulation and funding. The Supreme Court disagreed, stating:

> Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. *That legislative choice in no way makes these services the exclusive province of the State.*

Rendell-Baker, 457 U.S. at 842 (emphasis added). Likewise, New York's authorization of civil commitment and assumption of care for the mentally ill under MHL § 7.01 do not convert involuntary commitment into a function traditionally reserved to the a state. Finally, *Ruffler* neglected the importance of the fact that the decision to commit Okunieff was based on medical judgment according to generally accepted medical standards, a fact the Supreme Court found crucial in Blum, as discussed above. For these reasons, *Ruffler* will not be followed.

Rubenstein is also unpersuasive as it relied heavily on *Ruffler*. In fact, the *Rubenstein* court recognized that *Ruffler* was criticized for not applying the "exclusivity" requirement in its public function analysis, but did not address why the requirement should not be followed. Rather, the court held that the activity of the private hospital in committing an individual was nonetheless reserved to the State under either its *parens patriae* or police power. *See Rubenstein*, 790 F. Supp. at 406. The court asked, "[i]f the State is not providing the authority to deny an individual his liberty what is providing

the authority?" *Id.* (quoting *Plain v. Flicker*, 645 F. Supp. 898, 905 (D.N.J. 1986). To answer the court's inquiry, the authority which private physicians and private hospitals use to commit an individual is the professional medical standard of the community where the physicians' medical judgments are based. The professional standard at which a physician is accountable is not established by the State.

The private physician is not exercising governmental authority when he or she uses medical judgment in assessing the dangerousness of an individual for commitment purposes. Similarly, when a physician prescribes medication, the physician is not exercising government authority but rather using medical judgment despite the fact that the physician is licensed by the State to prescribe medication. Authorization by the State does not constitute a public function. Failing to abide by the exclusivity requirement would create a slippery slope whereby private physicians who prescribe medication would be deemed state actors simply because the authority to license the physicians lies with the State.

In her quest to convert the Hospital Defendants into state actors, Okunieff proclaims that *Polk County v. Dodson*, 454 U.S. 312 (1981), and *West v. Atkins*, 487 U.S. 42 (1988), leave little doubt that the Hospital Defendants engaged in state action. Both cases, however, are distinguishable from the instant case as West involves prisoners, who are wards of the State, and *Dodson* involves state employees, not private individuals. The *Dodson* Court held that a public defender is not a state actor when defending indigent clients because he or she uses professional judgment in performing a lawyer's traditional function as counsel and takes an adversarial stance against the State. *See Dodson*, 454 U.S. at 318-20. *Dodson's* context is so far removed from the case at bar that it does not merit discussion.[7] West, on the other hand, does involve physicians. Okunieff's reliance on West, nonetheless, is mis-

[7] If anything, *Dodson's* analysis regarding the use of professional judgment may be used as an analogy to support the Hospital Defendants' assertion that there is no state action in this case.

placed because it was decided in the context of providing medical treatment to prisoners.

The Supreme Court held in *West* that a private physician under contract with the State to provide medical care to prisoners engaged in state action despite the fact that the challenged activity turned on medical judgments. The Court reasoned that the physician within the state prison performed a public function reserved to the State—providing medical care to prisoners. Unlike Plaintiff in the instant case, the prisoner in West was not free to consult a physician of his choosing. "[T]he only medical care West could receive for his injury was that provided by the State." *West*, 487 U.S. at 55. The State bore an affirmative, constitutional duty to provide medical treatment to those in custody. *See id.* at 56. Here, the State bears no duty to commit individuals involuntarily. The *West* Court realized that "although the provision of medical services is a function traditionally performed by private individuals, the context in which [these services were performed] for the State . . . distinguishes the relationship between [this physician] and *West* from the ordinary physician-patient relationship." *Id.* at 56 n. 15. The rationale behind the *West* decision lies in the fact that the prisoner relies entirely on prison authorities for medical treatment, and therefore health care in state prisons is the exclusive prerogative of the State. *See id.* at 55. The context in this case differs. It does not follow that because private physicians who are contracted by the State to provide medical care to prisoners, who are wards of the State, can be held as state actors, so too must private physicians who involuntarily commit citizens due to authorization by the State. Okunieff's assertion that just as the Eighth Amendment requires the State to provide adequate medical care to prisoners, the Fourteenth Amendment requires the State to provide minimally adequate care to mentally ill patients confined in institutions is inapposite to this case. It is not the care Okunieff may have received after commitment that is at issue but the decision by the Hospital Defendants to commit the Okunieff in the first instance.

A proper determination of whether an activity is a public function involves delving into the history of the activity. The circuit courts that have studied the history of involuntary commitment have concluded that such commitments have not traditionally been the exclusive prerogative of the State. *See Rockwell,* 26 F.3d at 258-60 (finding that history of involuntary commitment in Massachusetts reveals it is not a public function); *Spencer*, 864 F.2d at 1380-82 (same regarding involuntary commitment in Illinois). This inquiry, of course, is state specific. In the case at bar, history demonstrates that involuntary commitment has not been exclusively a function of New York State and thus is not a traditional public function.

In New York, involuntary treatment and confinement of the mentally ill originated in private homes, and later it took place in both private and public institutes. Since the beginning of the United States, families, friends, and guardians have cared for the mentally ill privately. *See* Henry M. Hurd *et. al.*, 1 *The Institutional Care of the Insane in the United States and Canada* 40 (Johns Hopkins Press 1916). According to Blackstone, writing in 1765, "[o]n the first attack of lunacy, or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of the nearest friends and relations." 1 *Commentaries on the Laws of England* 305. The New York Hospital, a private, not-for-profit hospital, was one of the first institutions to admit the mentally ill for in-patient care. The first patient was received in 1792. *See* Albert Deutsch, *The Mentally Ill in America* 97-98 (2d ed. 1949). In those days, "commitment could be effected with the greatest of ease. No specific safeguard existed for the protection of the personal liberty of the supposedly mentally ill person. The pauper and indigent insane might be summarily committed to the poorhouse, prison or hospital by friends or relatives or by order of public officials. . . ." *Id.* at 420

In New York, there seems to have been little early legislation in reference to the mentally ill, and if they were depen-

dent, they were probably classed among the poor. *See* Hurd, *supra*, at 86. "The violent and dangerously insane were handled under the authority of the sovereign's police powers." Samuel J. Brakel *et al.*, *The Mentally Disabled and the Law* 22 (3d ed. 1985). In 1838, private asylums, county poorhouses, public asylums and lunatic asylums of the City of New York were recognized by statute. *See* Hurd, *supra*, at 87. The care of the mentally ill, however, was not recognized as a public duty, except insofar as it sought to protect the public from violent persons. *See id.* Private institutional care predated public institutional care, as it was not until 1842 that laws were passed to erect the first state institution in New York. *See id.* The earliest movement toward complete state care did not come until the second half of the nineteenth century. *See* Deutsch, *supra*, at 234. In 1874, New York passed a law authorizing any asylum, public or private, institution, home, or retreat that cared for the mentally ill, without court order, to commit for five days any person upon the certificates of two physicians. 1874 N.Y. Laws ch. 446, § 1. *See Rockwell*, 26 F.3d at 259 (noting similar law passed in Massachusetts).

History reveals that involuntary commitment has long been a private remedy, although subject to safeguards, like repossession, self-defense, citizen's arrest, and other infringements on rights of liberty and property. *See Spencer*, 864 F.2d at 1380. Even if New York had been following the same procedure set forth in the current Mental Hygiene Law for the last 200 years, that would tend to show that

> Commitment had not been an exclusively public function, any more than transportation, or the removal of trespassers from one's property, or the repossession of goods from a defaulting debtor are exclusively public functions—that almost a century before the enactment of the Fourteenth Amendment, private persons were doing what [Plaintiff] contends is the work of the state today even when done by private persons,

id., such as the Hospital Defendants. That the State can authorize commitment through its *parens patriae* or police powers does not make it the exclusive prerogative of the State. The reasons for private commitment are practical. A person may need to be restrained immediately, by his or her family, physician, or even a stranger, and there may not be a public institution at hand. *See id.* at 1381. This is why the responsibility for treatment of the mentally ill is shared between private and public institutions. Simply because commitment today may only be effected in the manner prescribed by New York State does not prove that the power to commit has traditionally been the exclusive prerogative of New York, "Private commitment is no more state action than a citizen's arrest, the repossession of chattels, or the ejection of trespassers is." *Id.*

As this Court stated in *Thomas v. Beth Israel Hosp., Inc.*, as a general rule, private hospitals do not act under color of state law for § 1983 purposes. 710 F. Supp. 935, 940 (S.D.N.Y. 1989) (noting that private hospital was not acting under color of law when it complied with New York Child Protective Services Act by reporting suspected child abuse). The rule applies here. The application of the state compulsion, close nexus/joint action, and public function tests establish that the MHL, at most, provides a licensing provision enabling the private hospital to receive mental patients. Licensing and regulations are insufficient to transform the Hospital Defendants into state actors for § 1983 purposes. Holding otherwise would expose private physicians and private hospitals to section 1983 liability whenever they act pursuant to the MHL, despite the fact that their actions reflect medical judgments made according to generally accepted professional standards that are not established by New York State.

B. *Defendant Rosenberg Is Not a State Actor*

Defendant Rosenberg did not engage in state action when he authorized transport of Okunieff to CPMC for a psychiatric evaluation. Like the Hospital Defendants, Rosenberg is a private actor. Therefore the state compulsion, close nexus/joint

action, and public function tests are applicable. Their application mandates the same conclusions when applied as when applied to the Hospital Defendants: there was no state action. A test-by-test analysis, however, proves unnecessary because Rosenberg did not commit the act of which Okunieff complains. He was not among the physicians who committed Okunieff against her will pursuant to the MHL. His actions are one step removed from those of the Hospital Defendants. Rosenberg simply took steps necessary to secure a psychiatric examination of Okunieff. Okunieff's contention that Rosenberg should be deemed a state actor because it was his actions that set in motion the events that eventually led to her civil commitment cannot be sustained. Indeed, the Tenth Circuit in *Pino* dismissed a claim against a private therapist who advised police to transport the plaintiff to a hospital for psychiatric evaluation. See *Pino*, 75 F. 3d at 1466. The court reasoned that:

> [The therapist's] conduct does not rise to the level of state action merely because [the officers] responded to her call to the dispatcher and heeded her advice to transport Appellant to the hospital. Moreover, [the therapist], by her actions . . . did not exercise "some right or privilege" or act under a "rule of conduct" created by state law as required by *Lugar*.

Id. at 1465; *see Harvey*, 949 F. 2d at 1132 ("[P]rivate persons . . . who act pursuant to state statutes to commit the mentally ill cannot be held liable under section 1983.") Unlike civil commitment, ordering transport of Okunieff to the hospital for a psychiatric evaluation does not constitute a significant deprivation of liberty requiring due process protection. As the facts indicate, Okunieff was not subjected to four-point restraints during transport.

In deciding that Okunieff required a psychiatric evaluation Rosenberg relied not on statute but on pure medical judgment, thereby dispelling any notion of state compulsion. In addition, this function has never been within the exclusion function of

the State. In fact, one need not be a physician to facilitate a psychiatric evaluation of a person. A father, mother, sister, brother, husband, wife, or any person with whom the person alleged to be mentally ill resides could secure such an evaluation, *see* MHL § 9.27 (b), or request the person be taken into custody, if necessary, for the purposes of obtaining a psychiatric evaluation. *See Watkins v. Roche*, 529 F. Supp. 327, 329-30 (S.D. Ga. 1981) (finding that private physician's execution of certificate involuntarily subjecting plaintiff to psychiatric examination did not constitute state action because ordinary citizens had the same authority as the physician and the physician was not required or compelled by statute to execute the certificate). Thus, Okunieff's assertion that the law treats physicians differently than other citizens as physicians are authorized to make decisions that can result in involuntary commitment is misplaced.

It was found above that involuntary commitment itself does not convert a private actor into a state actor. *A fortiori*, actions taken by a private physician to set the ball rolling so that involuntary commitment might be a possibility certainly do not equal state action. Even if involuntary commitment were attributable to the State, requesting a psychiatric examination that ultimately leads to involuntary commitment surely cannot be. Holding otherwise would cast the net of § 1983 liability too far. A mother who brings her disturbed daughter to CPMC for psychiatric evaluation would be subject to § 1983 liability. Okunieff's claim is neither practical nor legally valid. A private physician does not trigger state action when he or she determines a patient is in need of immediate psychiatric evaluation and takes steps necessary to facilitate that evaluation.

Because Defendant Rosenberg is not an employee or agent of the State, his decision and actions constituted nothing more than treatment of a patient based only on medical judgment, and most importantly, he was not the physician who involuntarily committed Okunieff, Okunieff's § 1983 claim must fail for lack of state action.

III. *Okunieff's Pendent State Law Claims Will Be Dismissed*

A district court may decline supplemental jurisdiction when it dismisses all claims over which it has original jurisdiction. 28 U.S.C. § 1367 (c)(3). Since the parties are in an early state of the case and the federal claims have been dismissed, leaving no independent basis of jurisdiction over the remaining state claims, they will also be dismissed. *See Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994); *Modeste v. Local 1199*, 850 F. Supp. 1156, 1167 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994).

Conclusion

In sum, Okunieff has failed to raise a genuine issue of material fact that the Hospital Defendants and Defendant Rosenberg's actions could be attributed to the State. For the reasons set forth above, Defendants' motions for summary judgment are granted, and all pendent state law claims are dismissed for lack of supplemental jurisdiction.

It is so ordered.

New York, N. Y.
May 7, 1998

ROBERT W. SWEET

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Mental Hygiene Law Section 7.07 provides in relevant part:

(a) The office of mental health is charged with the responsibility for assuring the development of comprehensive plans, programs, and services in the areas of research, prevention, and care, treatment, rehabilitation, education, and training of the mentally ill.

New York Mental Hygiene Law Section 9.03 provides in relevant part:

Unless otherwise specifically provided for by statute, a mentally ill person shall be admitted to a hospital as an inpatient only pursuant to the provisions of this article.

New York Mental Hygiene Law § 9.27 provides in relevant part:

(a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

(b) Such application must have been executed within ten days prior to such admission. It may be executed by any one of the following:

1. any person with whom the person alleged to be mentally ill resides.

2. the father or mother, husband or wife, brother or sister, or the child of any such person or the nearest available relative.

3. the committee of such person.

4. an officer of any public or well recognized charitable institution or agency or home in whose institution the person alleged to be mentally ill resides.

5. the director of community services or social services official, as defined in the social services law, of the city or county in which any such person may be.

6. the director of the hospital or of a general hospital, as defined in article twenty-eight of the public health law, in which the patient is hospitalized.

7. the director or person in charge of a facility providing care to alcoholics, or substance abusers or substance dependent persons.

8. the director of the division for youth, acting in accordance with the provisions of section five hundred nine of the executive law.

9. subject to the terms of any court order or any instrument executed pursuant to section three hundred eighty-four-a of the social services law, a social services official or authorized agency which has, pursuant to the social services law, care and custody or guardianship and custody of a child over the age of sixteen.

10. subject to the terms of any court order a person or entity having custody of a child pursuant to an order issued pursuant to section seven hundred fifty-six or one thousand

fifty-five of the family court act.

11. a qualified psychiatrist who is either supervising the treatment of or treating such person for a mental illness in a facility licensed or operated by the office of mental health.

(c) Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based and shall be executed under penalty of perjury but shall not require the signature of a notary public thereon.

(d) Before an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization. If the examining physician knows that the person he is examining for involuntary care and treatment has been under prior treatment, he shall, insofar as possible, consult with the physician or psychologist furnishing such prior treatment prior to completing his certificate.

(e) The director of the hospital where such person is brought shall cause such person to be examined forthwith by a physician who shall be a member of the psychiatric staff of such hospital other than the original examining physicians whose certificate or certificates accompanied the application and, if such person is found to be in need of involuntary care and treatment, he may be admitted thereto as a patient as herein provided.

New York Mental Hygiene Law § 31.02(a)(2) provides in relevant part:

(a) Except as provided in subdivision (b) of this section no provider of services shall engage in any of the following activities without an operating certificate issued by the commissioner pursuant to this article:

2. operation of any part of a general hospital for the purpose of providing residential or non-residential services for the mentally disabled.

New York Mental Hygiene Law § 31.04(a)(4) provides in relevant part:

(a) The commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of this article, including, but not limited to the following:

4. establishing procedures for the issuance, amendment, and renewal of operating certificates, including temporary operating certificates, and for the suspension of revocation of operating certificates. Such procedures shall specify that no application for the issuance or renewal of an operating certificate for a hospital which is operated as part of a hospital as defined as defined in article twenty-eight of the public health law, shall be effective until such hospital is granted approval to admit patients in emergencies for immediate observation, care and treatment in accordance with section 9.39 or 9.40 of this chapter, provided that the commissioner shall waive this requirement for two year periods upon his determination that (i) there is no need for additional beds for emergency psychiatric admissions in the local geographic area, (ii) the hospital lacks the physical capacity to reasonably accommodate such emergency admissions without extensive structural changes, (iii) the hospital does not and reasonably could not provide the scope of service necessary to assure adequate and appropriate psychiatric care and treatment for patients in emergency situations, or (iv) the hospital has agreed to accept referrals of involuntary psychiatric patients under an emergency admissions system which has been approved by the commissioner.